

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CHRISTOPHER MacDONALD,

ORIGINAL

Plaintiff-Appellant,

vs. Case No. 04-15979

KAHIKOLU, LTD., dba Frogman Charters,

Defendant-Appellee.

APPEAL ARGUMENT

February 14, 2006

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BEFORE: BARBARA ACOBA, CSR No. 412, RPR

Notary Public, State of Hawaii

APPEARANCES:

For Plaintiff-Appellant: HOWARD McPHERSON, Esq.

JOHN HILLSMAN, Esq.

For Defendant-Appellee: RICHARD WOOTTON, Esq.

1 JUDGE McKEOWN: But is -- but is the -- even if  
2 it's not inherently unsafe, that doesn't mean that there  
3 aren't limits to the safety of the sport itself,  
4 correct?

5 MR. WOOTTON: She -- that's correct, but she  
6 said it is a safe, easily learned skill. There's  
7 nothing inherently unsafe about it. It can be practiced  
8 in a safe manner. And that's, based on her findings,  
9 what I am suggesting is that if you look at all of the  
10 cases that talk about either the application of the  
11 Pennsylvania Rule, which I think has nothing to do with  
12 our case here, or the Kernan negligence per se rule,  
13 whether it's under Section 51 or 53 or the common law,  
14 which is a very tangled issue as you've seen in the  
15 briefing, the Courts have said, you need to take a look  
16 at whether not -- the test is not whether there is some  
17 connection or a possible connection. The test,  
18 according to the Wills case, is whether there is a  
19 logical, reasonable connection between the alleged -- or  
20 between the violation and the injury that follows, and I  
21 think that's part of what has caused all the straining  
22 in connection with these cases as it arises or as it  
23 pertains to both the Pennsylvania Rule and the  
24 negligence per se rule.

25 JUDGE McKEOWN: If the testimony is that it's

1 not inherently unsafe, but that if you had a dive manual  
2 it would tell you a level below which you shouldn't go  
3 without appropriate diving gear, why isn't that a  
4 logical, reasonable connection to the violation?

5 MR. WOOTTON: What I'm saying is that was the  
6 testimony of their expert. The Court rejected it. The  
7 Court, if you look at its findings, said this is a safe,  
8 easily learned skill.

9 JUDGE McKEOWN: It's two different things.

10 MR. WOOTTON: I understand. The evidence  
11 before the Court was additionally that there had been  
12 regularly dives to this depth and deeper, and this dive  
13 was a 47-foot dive.

14 JUDGE McKEOWN: Right.

15 MR. WOOTTON: And so the Court clearly adopted  
16 the point of view that making a dive like this was not  
17 unsafe. And the fact -- so what we would submit is the  
18 rejection of the Plaintiffs' expert, therefore --

19 JUDGE McKEOWN: Then there's no evidence on  
20 that point.

21 MR. WOOTTON: It rejects the logical, natural,  
22 causal connection between the activity which was  
23 performed and the reasons why you would apply negligence  
24 per se, leaving them really only with the argument that  
25 had there been a dive safety manual for scuba divers or